

**BEFORE THE
MISSOURI HAZARDOUS WASTE MANAGEMENT COMMISSION**

In. re:

Holcim (US) Inc./Energis LLC
14744 Hwy. 79 North
P.O. Box 456
Clarksville, MO 63336

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Order No. HW-06-3V
Variance Petition No. PER-06-1V

ORDER

INTRODUCTION

The Missouri Department of Natural Resources (department) received a variance petition (petition) from Holcim (US) Inc./Energis LLC (Holcim) June 14, 2006. Holcim submitted the petition pursuant to Section 260.405, RSMo. Holcim's petition requested a variance from 10 CSR 25-7.264 (3)(B)2.

The department reviewed the petition, as required by 10 CSR 25-8.124(5)(B). The department determined the petition to be non-substantive, based on state statutory and regulatory criteria. The department prepared a recommendation to the Missouri Hazardous Waste Management Commission (Commission). The department forwarded the petition and recommendation to the Commission August 8, 2006, within 60 days of receiving the petition, as required by 10 CSR 25-8.124(5)(C)2.

The department conducted public participation activities as described in 10 CSR 25-8.124(5)(C)2. The Bowling Green Times and Louisiana Press Journal published a legal notice announcing the recommendation. The department also sent a news release to its northeast region media broadcast e-mail list. The department mailed a copy of the legal notice to all record adjoining property owners and the highest elected official of both the county and city, town or village where the facility is located. The department posted the petition, recommendation, and legal notice on the department's Web site at www.dnr.mo.gov/env/hwp/permits/notices.htm and sent a copy of each to the Bowling Green Free Public Library for public viewing. All required notices were complete on or before August 16, 2006.

The department invited the public to review and offer written comments on the petition and the department's recommendation during a 30-day public comment period. The public comment

period began the day after the legal notice was published, August 16, 2006, and ended September 15, 2006. No comments, requests for public hearing, or applications to intervene were received during the public comment period.

FINDING OF FACT

1. Holcim's petition requested a variance from 10 CSR 25-7.264(3)(B)2, which states:

"The owner/operator shall unload hazardous waste from an incoming railcar within seventy-two (72) hours of receipt of the shipment."

2. Holcim operates a single, wet process cement kiln that produces approximately 4,000 tons per day of clinker, the primary ingredient in Portland cement. Pulverized coal is the primary fuel used for the cement kiln; however, Holcim also uses a wide variety of liquid and solid hazardous waste-derived fuel as supplementary fuel in the kiln. Because Holcim uses hazardous waste derived fuel, it must have a hazardous waste management permit. Holcim handles approximately 124 railcars a year.
3. Since Holcim does not control the scheduling and routing of these incoming railcars, it is not uncommon that cars aggregate off-site due to site restrictions for the 72-hour offloading requirement at the facility. This means that the railcars must be "staged" in a rail yard or siding where there are limited special provisions for safety and spill response. Under the current hazardous waste operating permit, Holcim regularly checks for leaks, spills, or other problems or hazards associated with staging the railcars at the facility and apply/follow the facility contingency plan in the case of an emergency. In addition, Holcim is further required to identify any newly discovered releases (such as a railcar leak/release) on its property and conduct an investigation under the corrective action portion of the permit.
4. The department reviewed the petition and determined the petition to be non-substantive, based on state statutory and regulatory criteria. The department prepared a recommendation and forwarded the petition and recommendation to the Commission on August 8, 2006.

The department conducted public participation activities as described in 10 CSR 25-8.124(5)(C)2. All required notices were complete on or before August 16, 2006. No comments, requests for public hearing, or applications to intervene were received during the 30-day public comment period.

RECOMMENDATION

1. Pursuant to Section 260.405 RSMo, and given the comparatively positive aspects of on-site railcar staging such as added security, inspections, and documented emergency response procedures, the department recommends that the Commission grant Holcim's petition for one year, but only under the following conditions:
 - a. Holcim is allowed ten days from the point of railcar receipt to offload hazardous waste into its permitted railcar management area. The point of railcar receipt at the Holcim facility is the point at which it enters its property boundary. In the case of kiln outages,

Holcim will continue its practice of requesting additional unloading time from the Hazardous Waste Program's Compliance/Enforcement Section. These extensions may be granted on a case-by-case basis

- b. Holcim shall conduct all railcar management activities in accordance with the Management Plan for Rail Tank Cars, which is incorporated herein. This plan specifies requirements for activities such as:
 - i. Railcar tracking system and record keeping;
 - ii. Inspection schedule and checklists;
 - iii. Spill response plan counter measures and timeframes for corrective action activities;
 - iv. Spill equipment inventory and contingency plan provisions;
 - v. Storm water controls, equipment, and spill procedures for the on-site railway siding area;
 - vi. Railcar movement procedures in the staging and permitted unloading area;
 - vii. Acknowledgement and compliance with corrective action conditions of Holcim's hazardous waste operating permit for newly identified releases and notification procedures; and
 - viii. Written agreements with other destination facilities that would accept full railcars in the event Holcim was unable to process in a sufficiently timely manner or ceased processing altogether.

CONCLUSIONS OF LAW

The Commission is, among other things, legally authorized to grant individual variances from the requirements of the Missouri Hazardous Waste Management Law and the regulations adopted under it, unless a variance is prohibited by any federal hazardous waste management act, and:

"...whenever it is found, upon presentation of adequate proof, that compliance with any provision of sections 260.350 to 260.430 or any standard, rule or regulation, order or license or permit term or condition adopted or issued hereunder will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except that, no variance shall be granted where the effect of a variance will permit the continuance of a condition which unreasonably poses a present or potential threat to the health of humans or other living organisms; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any

liability imposed by other law for the commission or maintenance of a nuisance or damage to the property or rights of any person.” Section 260.405.1, RSMo

Section 260.405, RSMo outlines the standards and procedures for issuing a variance. 10 CSR 25-8.124(5) outlines the procedures the department must follow concerning measuring the substantiveness of a variance request, issuing notices and conducting public hearings, if required. The Commission finds that the evidence presented at the public Commission meeting indicates that the department fully complied with the provisions of 10 CSR 25-8.124(5) in issuing proper notices and inviting public comments and requests for public hearings. The Commission also determined that the department fully complied with the provisions of 10 CSR 25-25-8.124(5) and Section 260.405, RSMo, in connection with the department’s consideration of the petition and all other relevant information in arriving at its recommendation to the Commission.

The Commission may grant a variance pursuant to Section 260.405, RSMo, if certain conditions are met. The department has reviewed each of these conditions and compared them to the facts of this case. The statute that authorizes a variance states:

1. ***“...if...compliance...will result in an arbitrary and unreasonable taking of property or practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people....” (260.405.1, RSMo)***

The department staff believes, based on technical analysis, that not granting this variance would impose a cost to Holcim without producing a corresponding benefit to the people. Holcim has to pay demurrage charges that could significantly reduce or possibly eliminate the delivery of hazardous waste shipments via rail to the facility.

2. ***“...Except ...{if} the effect of a variance will permit the continuance of a condition which unreasonably poses a present or potential threat to the health of humans or other living organisms.” (260.405.1, RSMo)***

The department staff does not believe that the effect of this variance will permit the continuation of a condition that unreasonably poses a present or potential threat to human health or the environment. Since any staged railcars will be in straight view of facility security and the facility has personnel training and corrective measure requirements built into their railcar management plan and hazardous waste permit to handle emergency responses, these activities are very closely monitored.

3. ***“...any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by any other law for the commission or maintenance of a nuisance or damage to the property or rights of any person” (260.405.1, RSMo)***

The department staff believes this variance will not be construed to relieve Holcim from any liability imposed by any other law for the commission or maintenance of a nuisance or damage to the property or rights of any person.

4. ***“In no event shall the variance be granted for a period of time greater than one year and shall not be renewable unless circumstances can be shown which preclude compliance within the one-year period of the variance and the renewal will not result in an unreasonable risk to the health of humans or the environment.” (260.405.3, RSMo)***

The Department recommends granting the variance for only one year. Since the department is considering making changes to 10 CSR 25-7.264 (3)(B)2 and the rulemaking process generally takes more than one year, the department believes that Holcim may request the commission to grant additional one year variances until such time as the regulation is modified. Although department staff believes that any subsequent renewal will not result in an unreasonable risk to human health and the environment, any decision on that issue is premature at this time.

ORDER

The Commission finds that Holcim (US) Inc./ Energis LLC has, by a preponderance of evidence, sustained the burden of proof necessary to demonstrate that it has met the statutory requirements of Section 260.405, RSMo, for the granting of a variance. The Commission hereby adopts the department’s recommendation and grants Holcim’s Petition for Variance subject to the conditions listed in the Recommendations section of this Variance Order.

This Variance shall be for one year, effective immediately.

Date Oct. 24, 2006

Missouri Hazardous Waste Management Commission

[Original signed by Patrick M. Gleason]

Pat Gleason, Chairman

[Original signed by Ben W. Kessler]

Ben Kessler, Commissioner

[Original signed by Timothy Warren]

Tim Warren, Vice-Chairman

[Original signed by Derrick Standley]

Derrick Standley, Commissioner

[Original not signed]

Jamie Frakes, Commissioner

[Original signed by Susan B. Williams]

Susan Williamson, Commissioner

[Original signed by Norella Huggins]

Norella Huggins, Commissioner